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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 228. 228

NYE & NISSEN (A Corporation), and ABRAHAM MONCHARSH,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

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OPINION BELOW.

The opinion of the Court of Appeals (R. 4602-4628) is reported at 168 F. (2d) 846.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1948 (R. 4628-29), and a petition for rehearing was denied July 22, 1948 (R. 4629). The petition for a writ of certiorari was filed August 17, 1948, and was granted October 25, 1948, 335 U. S. 852. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1). See also Rules 37(b) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED.

1. Whether evidence of other offenses similar to those described in the substantive counts can be properly considered by a jury for the purpose of determining the intent with which petitioner Moncharsh supposedly committed the substantive offenses where there was no evidence of his participation in any of the offenses or his aiding and abetting thereof on the theory that the doctrine of the *Pinkerton* case imposes liability upon him for their commission, when the substantive offenses were not submitted to the jury on the *Pinkerton* rule, but with specific instructions that evidence of participation or aiding and abetting must be found before a verdict of guilt could be returned.

2. Whether there was a prejudicial variance in the proof between the conspiracy charged and that proven, in that the evidence tended to show the existence of two conspiracies of different character, involving different persons.

3. Whether the doctrine of vicarious liability as set forth in *Pinkerton* v. *United States*, 328 U. S. 640, can be applied by an appellate court to sustain a conviction on substantive counts following a conspiracy count where the cause was submitted to the jury on a different theory and where the jury was not directed to make findings of fact as to (a) whether the conspiracy was in existence at the time the substantive offenses were committed; and (b) whether the substantive offenses were committed in furtherance of the conspiracy or the object of it.

STATUTES INVOLVED.

Section 35 of the Criminal Code, as amended (18 U. S. C. [1946 ed.] 80), in force at all times herein material, provided:

> *Presenting false claims: aiding in obtaining payment thereof.* Whoever shall make or cause to be made or present or cause to be presented, for payment or approval to or by any person or officer in the civil,

military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or by any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years or both.

Section 37 of the Criminal Code (18 U. S. C. [1946 ed.] 88), provided:

Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (18 U. S. C. [1946 ed.] 550), provided:

"Principals" defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT.

Nye & Nissen, a corporation, and Abraham Moncharsh, together with Henry Berman and Ruby Goddard after trial before a jury were convicted on all counts of an indictment which charged a conspiracy to defraud the United States (18 U. S. C. 88), and the filing of six false claims with a government agency (18 U. S. C. 80) (R. 4415). Another defendant, Edward Menges, was acquitted on all counts (R. 4415). Moncharsh was sentenced to two years imprisonment and a $5,000 fine on the conspiracy count (R. 4425). On the six substantive counts he was sentenced to five years imprisonment and a $5,000 fine on each count, the sentences to run concurrently (R. 4425). The company was fined $5,000 on each of the seven counts (R. 4425). On appeal by petitioners alone the judgments of conviction were affirmed (R. 4629).

Count one (R. 2-10) of the indictment (R. 2-26) alleged that commencing on January 1, 1938, and continuing to the return date of the indictment, June 20, 1945, Nye & Nissen, Berman, Goddard, Menges and Moncharsh[1] conspired to defraud the United States by grading, weighing, packing, selling and delivering to the War Shipping Administration, the War Department and the Navy Department inferior products through frauds practiced upon government inspectors who examined or graded butter, eggs and cheese sold to the aforementioned government agencies; by defeating the lawful functions of the inspection system of the government; by evading standards, grades, weights and specifications by means of false inspection; and by preventing honest and accurate inspection, grading and weighing by government inspectors.

The manner and means of defrauding the United States were described with particularity and five overt acts in furtherance of the alleged conspiracy were set out. The

[1] A named co-conspirator, Nix, was not indicted and did not appear at the trial.

overt acts (R. 8-10) recited that on or about the first day of June 1940, the defendants Goddard, Menges and co-conspirator Nix, placed a government stamp on cases of eggs which had not been inspected[2]; that on or about the first day of February 1942, the defendants Goddard, Menges and co-conspirator Nix, undercut one pound prints of butter and submitted same to government inspectors; that on or about the first day of February, 1942, defendants Moncharsh, Goddard, Menges and co-conspirator Nix, switched eggs from cases previously inspected by government inspectors and substituted eggs of an inferior quality; that on or about the 10th day of May, 1944, the defendant Goddard caused forty-five cases of eggs to be sold to the War Shipping Administration which eggs were of lesser grade, weight and price than that reported to the purchaser; that on or about the 10th of May 1944, the defendant Berman removed from four cases of cheese the stamp indicating the correct weight of said cheese, caused the same to be sold to the War Shipping Administration and caused said purchaser to be charged for more cheese than that actually delivered.

In addition to the conspiracy count there were six additional counts (R. 10-26) each charging the filing of a false claim with the War Shipping Administration. Count 2 described the filing of a false voucher on April 29, 1944; count 3, a similar voucher on May 10, 1944; count 4, a similar voucher on May 9, 1944; count 5, a similar voucher on May 1, 1944; count 6, a similar voucher on May 3, 1944; count 7, a similar voucher on May 1, 1944. All of these alleged false vouchers were filed with private commercial steamship companies which by contract with the War Shipping Administration acted as general agents for the United States.

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[2] In the court below the prosecution abandoned this overt act because the evidence indicated that the acts were committed some time in the year 1938.

For more than fifty years, Nye & Nissen was an outstanding West Coast merchandiser of butter, eggs, and cheese. Moncharsh was the President of the corporation, a director, and owner of one-third of its outstanding stock (R. 4037-4038); Berman was the manager of the City Sales Division of the company (R. 3403); while Goddard was a shipping and receiving clerk (R. 3885). Menges, working under the supervision of Goddard and Berman (R. 3797-3798), had particular charge of the candling room (R. 3792).

Although the company operated various plants (approximately twelve) not only in the state of California but also in Utah and Washington (R. 4038-4039, 4228-4229), the entire evidence in this case is confined to the conduct of its business at its plant in San Francisco, which was considered its main office (R. 4038).

Long before the war, Nye & Nissen had built up an established and extensive volume of business. Various private shipping companies on the Pacific coast, including the Matson Navigation Co., American President Lines, and Moore McCormick Steamship Co. were numbered among its old time customers (R. 4240). It was the settled practice for these steamship companies, which later became general agents for the War Shipping Administration, to conduct their business with Smith, the Vice-President of Nye & Nissen, and through him with Goddard and later, in 1943, also with Berman (R. 4232-4234).

Eighty percent of the company's sales were made directly from its plants at Petaluma and Santa Cruz in the state of California and its plants in the states of Utah and Washington (R. 4228-29). The volume of its sales is reflected by the fact that during the years 1938 to 1944 the company sold 2,007,814 cases of eggs (each containing 30 dozen) and 37,287,508 lbs. of butter and cheese (R. 4266). The dollar volume of sales averaged between five and eight million dollars a year and its annual payroll exceeded $300,000 (R. 4039).

As President of the company, Moncharsh devoted particular attention to executive problems connected with its substantial operations. It was necessary for him to travel from one plant to another in the states of California, Washington and Utah for the purpose of conducting conferences with supervisory employees and also for the purpose of developing sources of supply (R. 4038-4043). It was his duty "to have meetings with the various plant managers, discuss their problems, discuss the help problem, discuss the purchase of farm products, such as eggs and feed which we had to supply to various producers, had to buy packing materials, such as cases, fillers, flats, nails and many other things that apply just to the egg plants." (R. 4039). Between 1938 and the outbreak of the war Moncharsh was required to travel "most of the time" and "would travel to various plants, go back to New York, Chicago, Philadelphia, visit many of our buyers" (R. 4042). And later, for example, during part of the time covered by the substantive counts of the indictment, namely April 24 to May 15, 1944, he was on business trips to Tacoma, Washington, and Salt Lake City, Utah (R. 4110-4111). He was, as Smith testified, "the executive" of the organization (R. 4228).

Moncharsh did not handle purchase orders or invoices (R. 4059), nor did he ever direct employees as to the manner of filling particular orders (R. 4060). As previously noted, all contacts with steamship companies were the particular responsibility of Smith and in some part, that of Berman. There was no evidence introduced at the trial tending to show that Moncharsh ever had knowledge of any particular invoice or voucher introduced by the prosecution.

The Conspiracy—Its Origin and Nature for the Years 1938 to 1942.

The proof of the initiation of the alleged unlawful agreement to defraud the United States and its operation for five consecutive years, namely 1938 to 1942, was predicated

practically in its entirety on the testimony of two former employees of the company, Pineda and Andrade (R. 444-536, 777-1307, 3219-3337). Their testimony was specifically contradicted by all of the defendants to whom it related, each of whom testified at the trial, and in addition, there was other evidence of persuasive character which refuted much of it. It was their testimony alone, however, which permitted an inference of fraudulent conduct on the part of both Moncharsh and Menges to be drawn. As has been noted, Menges was acquitted on all counts of the indictment.

Pineda was continuously in the employ of the company from 1934 to October 1942 (R. 444). During a five week period in the early part of 1943 he returned to the company (R. 445). His duties were those of a general handyman, spending most of his time in the breaking room, helping out in the butter room, and occasionally working on the floor (R. 3887). At all times he worked under the supervision of Goddard (R. 3888). Andrade was employed as a truck driver from 1931 until November 1940 (R. 3219, 3221). As a result of a dispute with Moncharsh arising out of the filing of a claim for an injury allegedly sustained by Andrade during the course of his employment which was resisted by the company before the Workmens' Compensation Board of the State of California, he left its employ (R. 3263). At the trial, Andrade admitted that he had sustained no injury whatever (R. 3266).

Succinctly summarized, the testimony of these two witnesses, if believed, tended to demonstrate that in isolated instances over the five year period there were various kinds of artifices practiced by the defendants for the purpose of circumventing the proper inspection by government representatives of eggs sold to the Army and Navy. Generally, the Army purchased the lowest type egg fit for human consumption, designated by the trade as a "standard" egg or a grade B egg (R. 758-59). Prior to delivery, the Army, acting through its Veterinary Corps, inspected the eggs first at the company plant (R. 367-380) and again at the point of delivery (R. 381-384). The inspection con-

sisted of a sample examination of about a hundred eggs (R. 373) selected at random by the Army inspector from five percent (R. 370) of the total number of cases included in a single order. After candling the samples, i.e., subjecting them to a rapid examination before an electric light, the quality and size of the entire order was then determined by the quality and size of the particular samples. It was the practice then to affix a government stamp to all of the cases included in the order (R. 376), following which the same type of inspection was reconducted at the point of delivery. Acceptance by the Army was determined by this latter inspection (R. 4229-30, 4337).

The Navy utilized the services of inspectors employed by the United States Department of Agriculture (R. 187). The procedure pursued was the same as that followed by the Army veterinary service.

The testimony of Pineda and Andrade tending to implicate Moncharsh in the commission of frauds upon the inspection service of the Army and Navy was confined to the following sporadic instances: At an unfixed time in 1939 after delivering an order of eggs to the Presidio of San Francisco where they were rejected by the Army inspector, Andrade said he received telephone orders from Moncharsh to return to the company plant but to refrain from driving into his usual stall if an Army car was observed in front of the plant. Andrade followed instructions and upon backing into the loading platform, Moncharsh immediately removed one case of eggs from the truck, examined them and observed that the eggs were such as to comply with the Army order and that the Army inspectors were wrong in their examination. An Army inspector turning up on the scene engaged in an argument with Moncharsh about the order, but following this conversation, Andrade was directed to return to the Presidio at a time in the afternoon when the same Army inspector would most likely not be on duty. With the exception of a change of two cases of alleged "sample" eggs the load was exactly the same as that delivered in the morning. (R. 3247-

3254). This occurrence was denied by Moncharsh (R. 4053-4054) and the Army inspector allegedly involved therein, Colonel Kielsmeier, although brought into the courtroom at one point of the trial by the government (R. 1295-1296), was not called as a witness to corroborate Andrade's testimony.

Andrade testified to having seen Moncharsh, one time in 1940, using an official Department of Agriculture stamp for the purpose of stamping up cases of eggs destined for delivery to the Navy which had not been officially inspected by the Department of Agriculture (R. 3256-3258). Andrade testified that while Moncharsh was so engaged, the Department of Agriculture inspector unexpectedly made an appearance, whereupon Moncharsh hurriedly stuck the stamp in his pocket (R. 3259). Andrade further testified that Smith who was also present, remonstrated with Moncharsh for engaging in this type of practice (R. 3259), and further that the Navy order which he had observed on Goddard's desk called for "special" eggs, or grade AA eggs (R. 3278-3279). Called as a witness for the defense, the Department of Agriculture inspector who conducted all inspections during this period of time, Moosman, testified that he could find no record of the Navy ever purchasing "special" eggs from the company (R. 3725). Andrade's testimony as to this incident was also contradicted by Moncharsh (R. 4071) and by Smith (R. 4255-4256). It was a common practice for the Department of Agriculture inspectors to turn over their official stamp to employees of the company for the purpose of assisting in the marking of cases of eggs following an official inspection (R. 308-309). Thus, Smith stated he had observed such a stamp in the possession of various employees for this purpose frequently over the years and had used it himself "on numerous occasions when the Department of Agriculture men would be there. They would be busy, and they would hand me the stamp—'stamp up those.' It wouldn't be large quantities—twenty-five cases, fifty cases—but the boys on the floor have stamped up large quantities for them, a

couple of hundred cases, three hundred cases, whatever the number of cases would be." (R. 4254-4255).

At an unfixed time in the year 1940, according to Pineda, Moncharsh was present on a dock at the waterfront when, under the direction of the truck driver, Pineda stacked cases of eggs bearing special marks on the top of each pile (R. 532-536, 780-781). This was denied by Moncharsh (R. 4065-4066).

Pineda stated that, on two occasions in 1941, Moncharsh was present when he and other employees assisted in the removal of eggs from cases bearing a government inspection stamp and substituting other eggs for them (R. 891-898). On one occasion he testified that Moncharsh assisted in the removal of eggs from at least two cases working in conjunction with Berman (R. 894). This testimony was contradicted by Moncharsh (R. 4068) and by Berman (R. 3447).

According to Andrade, "in the middle of 1939 or the latter part of 1939," under instructions from Goddard, he and other employees used a Department of Agriculture stamp to mark cases of eggs as officially inspected which had never been submitted to the inspectors, and at various times this stamp was so employed by Moncharsh (R. 3234-3244). This also was denied by Moncharsh (R. 4070-4072).

The foregoing recitation substantially summarizes the evidence pertaining to Moncharsh which, if believed, implicated him in the alleged frauds. The bulk of the Pineda and Andrade testimony related to purported fraudulent conduct on the part of Berman, Goddard and the acquitted defendant, Menges, all of whom in their own testimony denied the accusations. In rebuttal of the denials of Menges, four girl employees who worked in the candling room under his supervision testified that, in October 1942, acting under his instructions they removed eggs from cases bearing a government inspection stamp and substituted other eggs (R. 4289-4319). Another employee engaged in a similar capacity, Briant, testified that on orders from

Menges in September 1940 she transferred eggs from a case bearing a government inspection stamp and refilled it with other eggs (R. 3177-3217). This testimony was received with the expressed limitation by the court that "with the understanding that it is connected up, I will allow it" (R. 3180). This was never done, and a motion to strike the testimony was denied (R. 3210). Significantly, Menges and other defense witnesses testified that eggs were transferred from such cases quite frequently when the company would run short of a supply for civilian customers following which the government stamp would be defaced (R. 3842, 3964).

The testimony of Pineda was received subject to repeated objection and a motion to strike it practically in entirety (R. 60-71) was denied (R. 3362). The motion was based, in part, upon the contention that the times fixed by the witness for the acts related by him were contradictory, vague, and too indefinite to justify their admission into evidence such as the following:

After testifying that a purported fraudulent act occurred "about in the Summer of 1942" (R. 462), the time was subsequently changed to "in about 1941" (R. 479). When objection was entered (R. 479-481) the witness offered to "give my opinion of the year" (R. 481). The time was finally fixed as "around 1941. . . . I would say 1941" (R. 482). Pineda testified to another transaction allegedly occurring "about the early part of 1941", and then immediately changed the date to "I think it was 1942, beginning of 1942" (R. 832). A conversation between Nix and Moncharsh which Pineda claimed took place following the rejection of an Army order of eggs was fixed as occurring in "the latter part of 1938" (R. 840). When pressed by the Court to fix the time, his statement was "between 12 and 12:30, the latter part of 1938" (R. 841). Overt act B (R. 8-9) which was alleged in the indictment to have occurred on or about June 1, 1940, was abandoned by the government on appeal because Pineda in his testimony

fixed the date of the alleged transaction as occurring in "about the middle of 1938" (R. 849-851). After identifying an Army inspector allegedly present when many of the purported frauds were perpetrated as a Colonel Foster and referring to him in his testimony day after day, Pineda identified another Army officer, Colonel Kielsmeier, as the person to whom his testimony related (R. 1294-1299).

Over repeated objections, Lt. Col. Hand, an Army Veterinary Corps inspector, was permitted to testify that in the early Fall of 1941 he observed three bad eggs in a frying pan at the Presidio in San Francisco which had been taken from three cases of eggs bearing the Nye & Nissen label and bearing his inspection stamp dated about two days previously; that he examined every egg in every case and found ten percent of them inedible. That again in the Fall of 1941 in the pastry shop at the Letterman General Hospital he counted four or five "rotten" eggs in a bowl containing fifty eggs; that he saw three cases of eggs bearing the Nye & Nissen label and his own inspection stamp dated approximately three days prior thereto and examined every egg in every case, finding five percent of them inedible (R. 394-407). Hand admitted that the eggs were "Standard", i.e., the lowest type fit for human consumption (R. 758-759, 763), which the Army was specifically purchasing from Nye & Nissen at that time.[3]

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[3] Whitmore, an egg expert with twenty-five years experience, testified that he had "seen eggs drop from AA a full grade overnight many times." (R. 4212) Hand admitted that it was possible for a high quality egg to deteriorate to a black rot in a period of twenty-four hours depending upon varying conditions of storage and handling (R. 634). Evans, another government witness, admitted that in order to render an opinion as to the condition of eggs on a particular day it would be necessary for him to examine the eggs on that day. "All I would have would be my opinion and the experience of handling eggs and how much they would drop. . . . I wouldn't know what they were two days before; I couldn't testify what they were" (R. 2840).

No evidence whatever was introduced of any false or fraudulent invoices having been submitted to the Army or the Navy by the company during the time covered by witnesses Pineda and Andrade, namely, 1938 to 1942.

Evidence of the Conspiracy During 1943 and 1944 and Proof of the Substantive Counts.

For the years 1943 and 1944 the evidence related exclusively to specific sales of eggs and cheese to eighteen merchant ships operated by private shipping lines as general agents for the War Shipping Administration. Although the company continued to sell in substantial quantities to both the Army and Navy, there was no further evidence of any character relating to such transactions.[4]

As noted above, the War Shipping Administration was created by executive order of the President on February 7, 1942 (50 U. S. C., App. 1295). The Administration by contract designated private shipping companies as general agents for the purpose of operating and managing merchant vessels on behalf of the United States. Historically, Nye & Nissen had always conducted an extensive business with steamship companies on the West Coast, which trade was continued following their designation as general agents for the War Shipping Administration. This phase of the business was peculiarly under the jurisdiction of Smith, the Vice-President (R. 4228, 4231-4233) and in part under the jurisdiction of Berman, in his capacity as the manager of the City Sales Division of the company (R. 3400-3402). Moncharsh had nothing whatever to do with sales to the shipping lines (R. 4073). He "never even saw

[4] In April and May 1944, the time covered by the substantive counts in the indictment, the Army was purchasing and receiving approximately 1800 cases of eggs a week from Nye & Nissen without complaint (R. 609). Similarly in 1944, the company sold 92,355 cases of eggs and 242,760 lbs. of butter to the armed services (R. 4627-4628).

purchase orders" (R. 4059, 4233). The orders were placed by telephone or letter chiefly with Smith, who in turn conveyed them to Goddard for filling and shipment (R. 4073, 4232). In his capacity as manager of the City Sales Division, Berman was frequently contacted directly by the steamship companies and not only received orders but also supervised the preparation of them (R. 4233-4234). The evidence shows that Moncharsh not only had no knowledge of the receipt of any order referred to in this case, but also was totally removed from actual or implied knowledge of any voucher, document or paper in connection with them.

While sales to the Army and Navy during all the years covered by the indictment required an official inspection, it was not until January 15, 1944, that the War Shipping Administration first required a similar official inspection of products sold to its general agents (R. 3555-3556). The Department of Agriculture which, at all times pertinent herein, was the inspecting agency for the Navy, acted in a similar capacity for the War Shipping Administration after that date. The War Shipping Administration provided by regulation that eggs once inspected could be sold within twenty-one days after such inspection as and for the grade or quality on the date of inspection (R. 635). Thus the perishability of the commodity was clearly recognized by the official regulations.

There is no evidence that the inspection of products included in the sales to the War Shipping Administration was ever circumvented or impaired.

For the entire year 1943 the evidence of the conspiracy was confined to one sale to the S. S. *William Clark*, a ship newly commissioned, bound on its maiden voyage in October 1943 under the management of the American President Lines. Under the direction of Goddard, forty-five cases of eggs and a quantity of butter were delivered to the ship at San Francisco about October 18 (R. 1691, 1700, 1717).

On November 1, Fisk, purchasing agent for the American President Lines, telephoned the Nye & Nissen plant and asked to talk with Smith (R. 4073-4074, 4175). In the absence of Smith, Moncharsh took the call and was told that a complaint had been received from the Clark at San Pedro to the effect that there was trouble with the eggs and butter (R. 4074, 4175). Moncharsh advised that he would direct the Nye & Nissen representative at Los Angeles to contact the steamer at once (R. 4074, 4175). Accordingly a teletype message was sent by Moncharsh to the representative at Los Angeles, Gartenberg, directing him to examine the eggs and butter immediately and ascertain the facts (R. 4074-4075). On November 3, in company with a Department of Agriculture inspector, Abel, Gartenberg went aboard the ship at Long Beach and examined the eggs and butter which were admittedly in poor condition (R. 2088-2095). Sometime on the same day, three other food inspectors representing respectively the State of California, the Federal Food and Drug Administration, and the County of Los Angeles, also boarded the ship and conducted similar examinations, and testified at length as to the condition of the eggs (R. 1847-1933, 1963-2026), this evidence going in over repeated objections of the defendants. Brown and Foster, the ship's cooks, testified at length and in detail as to the condition of some of the eggs which they had used aboard the vessel prior to its berthing at Long Beach, also over the objection of the defendants (R. 1715-1731, 1754-1765, 1825-1834). The products were removed from the vessel promptly and on the same day were replaced with new merchandise (R. 1856). The proof indicated that each of the forty-five cases of eggs aboard the Clark bore a stamped number "3737" (R. 2090), which had been assigned to 105 cases of eggs stored by Gartenberg in a warehouse in Los Angeles in February, 1943 (R. 2073-2075) and which had been shipped by him to the main plant at San Francisco on or about October 15, 1943, on orders from Moncharsh (R. 2083-2085).

Gartenberg testified that, on November 3, he wrote a letter to Moncharsh reporting on his investigation of the complaint. A carbon copy of the letter was introduced in evidence and read to the jury (R. 2101-2102). Moncharsh testified that he never received it (R. 4077).

At the request of Moncharsh, Fisk came to the company plant and examined the butter which had been removed from the ship and forwarded to San Francisco, and he testified that in his opinion its rancid condition was due to poor refrigeration (R. 4175-4180). Nevertheless a credit was issued to the American President Lines which was accepted as a satisfactory adjustment of the matter at that time (R. 4078).

Goddard testified that the eggs delivered to the S. S. *William Clark* were prepared under his direction (R. 3956-3960) and denied that storage eggs were used to fill the order (R. 3961).

The next phase of the proof related to a series of specific deliveries to merchant ships at the San Francisco waterfront during a four week span in April and May, 1944. Nystrom, a truck driver employed in the City Sales Division of the company from January 1944 to May 15, 1944 (R. 2450-2451) testified that he made fourteen of the deliveries under instructions received from Berman and Goddard (R. 2450-2531). Prior to the first delivery which became the subject matter of evidence in the case, Nystrom was contacted by agents Magee and Johnson of the Federal Bureau of Investigation (R. 2564-2566). In connection with each of the fourteen deliveries, Nystrom either phoned the investigators from the waterfront or prior to his arrival there (R. 2567-2590). In substance, Nystrom's testimony was that in each instance the deliveries were prepared under the supervision of Berman and Goddard and that at their direction cases of eggs bearing no government inspection stamp but rather a purple symbol "P" were intermixed with government inspected cases; that on one occasion he observed Berman scraping weight designations

off boxes of cheese included in the delivery (R. 2524); that all vouchers pertaining to the sales were handed him by Berman or Goddard, and following delivery were returned to them.

It was Nystrom's job to make deliveries of cases of eggs to retail stores in the city, which products required no government inspection stamp and frequently his truck would contain at the same time deliveries for ships along the waterfront and for these retail outlets (R. 2556). Berman testified that he experienced continued difficulty with Nystrom because of an impairment in his hearing and his inability to understand directions (R. 3457-3458). It was the everyday practice for Berman to indicate to Nystrom the eggs destined for particular deliveries and for Goddard to indicate the butter for such deliveries. Every day Berman told him the same thing he had told him the day before (R. 2550, 2563). Berman testified that in April 1944 Nystrom told him that he was "in the clutches of the FBI" because of an income tax investigation, and that he needed some money to pay up delinquent taxes; and that Berman arranged a loan of $100 which was subsequently repaid by Nystrom (R. 3588-3590).

Six of the specific deliveries to which Nystrom referred in his testimony became the basis for the substantive counts in the indictment.

Ranson, another company truck driver, testified that, under instructions from Goddard, he delivered ten cases of eggs bearing no government inspection stamp to a merchant vessel at the waterfront on May 10, 1944 (R. 1393-1419).

Lt. Col. Hand and Capt. Evans, officers of the Army Veterinary Corps normally engaged in official inspections for Army purchases, were assigned to assist agents Magee and Johnson in the investigation of the deliveries to ships along the waterfront during the times covered in the testimony of Nystrom and Ranson. Together with Magee and Johnson they made sample inspections immediately upon

delivery of the products or shortly thereafter. They testified in detail as to the results of their inspection of samples of eggs selected from each of the shipments. The gist of their testimony was that on each delivery the eggs did not conform in quality or size to the specifications set forth in the vouchers in that cases bearing no official inspection stamp were found to contain pullet eggs and that eggs contained in cases bearing the official stamp were of a quality lower than that required by the purchase order (R. 548-603, 2642-2726). This testimony was given over objections of the defendants and Capt. Evans admitted that in order to render an opinion as to the quality of the eggs at the time of the official Department of Agriculture inspection, it would be necessary for him to see and examine the eggs at that very time (R. 2839-2841).

Mahoney, a messman aboard the S. S. *John Muir* to which Nystrom had delivered forty-eight cases of eggs on April 24 (R. 2462) and which had been inspected by Hand and Magee on the same day (R. 2859) testified, over objection, as to the condition of the eggs during the first week of May 1944 when they were served to members of the crew (R. 1641-1647, 1652-1668).

The next and final phase of the proof related to a delivery of 400 cases of eggs to the S. S. *Hawaiian Shipper* on December 5, 1944. Prior to this time agents Magee and Johnson had interviewed the defendant Menges in July, 1944 (R. 3871-3873), the defendant Berman in August 1944, (R. 3653, 3662-3663), and the defendant Moncharsh on or about September 1, 1944 (R. 4338-4339). During the month of November these agents were frequently in the company's office examining various corporate records furnished to them (R. 4279-4281, 4284).

With reference to the S. S. *Hawaiian Shipper* transaction, the chief steward, Debes, testified that the eggs which were delivered to the dock on December 5 (R. 1343, 1354) were loaded aboard the vessel about four or five days prior to the time the ship left port, which was on December 16

(R. 1524-1526). Through the testimony of three members of the crew, Debes, Oscarsen, a baker, and Dolyn, a cook, evidence was adduced to the effect that some of the eggs were found to be rotten and further that in some cases there were missing layers of eggs (R. 1496-1524, 1541-1555, 1588-1600). This evidence related to the condition of the eggs after the ship had put to sea, and this entire line of testimony was objected to by the defendants (R. 1562-1576). Kirschbaum, purchasing agent for the company which operated the ship, testified that he generally contacted either Smith or Goddard in relation to all purchases, including the S. S. *Hawaiian Shipper* order (R. 1331-1332).

At the conclusion of its case the government moved to make applicable to the substantive counts all evidence relating to the delivery of alleged inferior eggs to ships other than the six vessels designated in the substantive counts as similar offenses for the purpose of proving the intent with which the substantive crimes were committed (R. 3342). The delivery to the S. S. *Hawaiian Shipper* in December, 1944, was specifically excepted from the motion. The motion was resisted and was not granted at that time (R. 3334-3361). However, the same motion was renewed at the conclusion of all the evidence in the case, and was then granted (R. 4354-4355).

In arguing the case to the jury, the culpability of Moncharsh for the substantive offenses was urged upon the jurors by counsel for the government in the following language, which represents the entire and exclusive comment as to him on these counts (R. 4503, 4577-4578):

> "There is no doubt that Berman caused his claims to be made and Goddard caused his, so presumably, the only question in this case is, did Menges and did Moncharsh have any part in these claims. Moncharsh was the president, he was the director of the business policies. Whenever he was in town he was there at the plant; Mrs. McKenna so testified. He kept a close touch on the business affairs of the company and under those circumstances, isn't it self-evident that he origi-

nated or was responsible for all of these fictitious practices, and he was the one who was the guiding spirit? He it was who surrounded himself with these subordinates who would carry out his plans. Under those circumstances there can be no doubt that Moncharsh is equally guilty with Berman and is equally guilty with Goddard." . . .

"Now, what is the responsibility of the other defendants than Berman and Goddard in connection with these particular counts? It is this: As far as the corporation is concerned, as was said to you yesterday by Mr. Houck, a corporation can act only through its officers and representatives. The pattern of this company's business was dictated by Abraham Moncharsh. There cannot be any question of that.

"As far as Menges is concerned, his duties related to the candling room. He was there for years and years. He knew the manner in which this business was being conducted in an improper way. He knew that small eggs, pee-wee eggs, cases of them were put over by Ruby Goddard's office. He knew the manner in which business was being conducted in that concern, and the law is that anyone who aids and abets the commission of an offense becomes a principal and is equally liable with any who actually perform the unlawful acts. Moncharsh is criminally responsible because he aids and abets everything that went on in that plant. He knew the pattern. He knew the course of conduct that was pursued, and the same is true of Menges. That is all I am going to say about those substantive counts."

Pursuant to the motion requesting that evidence of all transactions involving the delivery of eggs to ships be made applicable to all the substantive counts for the purpose of proving intent, the trial court gave the following instruction to the jury (R. 4377):

"Testimony has been introduced by the prosecution which, it is claimed, tends to show the commission of other acts or offenses by the defendant similar to that charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving

guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose."

This instruction as given was objected to by the defendants (R. 4384-4386).

With reference to the substantive counts, the trial judge specifically instructed the jury that in order to convict any of the defendants it would be necessary for them to find beyond a reasonable doubt that the defendant either (1) actually participated in the commission of the offenses or (2) aided or abetted their commission (R. 4365-4368).

On appeal, the Court of Appeals affirmed the conviction of Moncharsh on the conspiracy count on the basis that the evidence was sufficient to sustain a finding that he knowingly participated in a conspiracy. The issue as to whether or not there was a fatal variance between the conspiracy charged in the indictment and the proof was resolved by the Court of Appeals in favor of the government on the theory that all misconduct of the defendants was germane to one consistent and persistent course of wrongdoing (R. 4614-4616).

The conviction of Moncharsh for the substantive crimes was affirmed by the appellate court exclusively on the rule of *Pinkerton* v. *United States*, 328 U. S. 640. Specifically, the Court of Appeals said (R. 4616, 4618):

> "Since the evidence justifies a finding that the substantive offenses which are the subjects of Counts II through VII were committed in furtherance of a continuing conspiracy of which Moncharsh was a member, it should follow that the evidence is also sufficient to support a finding of Moncharsh's guilt on those counts under the rule in *Pinkerton* v. *United States*, 328 U. S. 640. Appellant Moncharsh does not contend that he had withdrawn from the conspiracy before the substantive offenses were committed, but seeks to avoid the force of the *Pinkerton* case on other grounds
> • • •

"Whatever the answer to this problem may be, we are of the opinion that the verdict of the jury on the substantive counts did not disregard or go beyond the scope of the instructions given. Appellants' contention to the contrary is answered by the *Pinkerton* case itself.

"So long as the conspiracy existed, the members acted for each other in carrying it forward. The criminal intent to commit substantive offenses in furtherance of the unlawful project was established by the formation of the conspiracy. 'Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. *The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle.*' (Emphasis supplied) *Pinkerton* v. *United States*, 328 U. S. 647."

The issue with respect to the consideration by the jury of offenses similar to those charged in the substantive counts for the purpose of determining the innocence or guilt of Moncharsh on those counts was also decided in favor of the government solely on the authority of *Pinkerton* v. *United States*. In this connection, the Court of Appeals stated (R. 4627-4628):

"Proof of the substantive counts required, as the trial court instructed, proof of a specific intent to defraud the United States. It is settled law that similar offenses may be admissible to show such intent. *Tedesco* v. *United States* (CCA 9), 118 F. (2d) 737. Specifically, the argument made here is that the prior similar offenses cannot be considered as evidence of Moncharsh's guilt under the substantive counts, since Moncharsh was not shown to have had any connection with them. This contention ignores the evidence indicating that Moncharsh participated in a conspiracy, in furtherance of which the acts charged in the substantive counts and the prior offenses were committed. This evidence establishes Moncharsh as an instigator of such acts and offenses, which thereby be-

came admissible against him in determining his guilt under the substantive counts. *Pinkerton* v. *United States*, 328 U. S. 640."

SUMMARY OF ARGUMENT.

I. The Court of Appeals erroneously approved, on the basis of the rule in *Pinkerton* v. *United States*, 328 U. S. 640, the action of the trial court in permitting the jury to consider evidence of other similar offenses which Moncharsh did not commit for the purpose of determining his guilt for the offenses charged in the substantive counts of the indictment. There was no evidence in the record connecting him with the commission of either the other similar offenses or the charged offenses. An essential prerequisite for the admission of evidence of other similar offenses is that the proof must demonstrate that the accused committed the other crime, and that complicity in such other offense must be established by clear and convincing proof. There is no authority for the unique situation presented here, namely, the admission of evidence of the commission of similar offenses by co-defendants against a particular defendant who is not shown to have participated in the crimes for the purpose of proving his intent with respect to charged offenses which he did not in fact commit.

The holding of the Court of Appeals is wholly rested on the erroneous application of the *Pinkerton* rule to the present case. By confusing the conspiratorial theory of the *Pinkerton* rule upon which the case was not submitted to the jury with the aiding and abetting theory the Court of Appeals has imposed on Moncharsh constructive responsibility for both sets of offenses. The *Pinkerton* rule cannot be applied here to justify such a holding. What has been done here is without precedent; constructive criminal intent has been superimposed upon constructive criminal guilt with resulting prejudice to Moncharsh.

In addition to the error in admitting such evidence against Moncharsh, there was further error in the instruction of the trial court on the point. The jury should have been advised that evidence of other similar offenses could not be considered by them until they had found that the charged offenses were committed by Moncharsh and were proceeding to determine the "intent" with which the crimes were committed. This was not done, and Moncharsh was obviously prejudiced since there was no evidence from which the jury could have found that he was implicated in the substantive crimes either as a participant or as an aider or abettor. Since he did not in fact commit the substantive offenses nor the similar offenses admitted against him it was obviously prejudicial to permit evidence of the latter to go to the jury as evidence of the "intent" with which he "committed" the former. Guilt by association and constructive guilt can scarcely be carried farther with prejudice to a particular defendant than they have been carried here.

II. Between the conspiracy charged in the indictment and the proof thereof, there was a variance prejudicial to Moncharsh in that the evidence tended to disclose two separate conspiracies of different character and involving different persons. The indictment alleged a conspiracy continuing from January 1, 1938 to and including the return of the indictment, June 20, 1945 to defraud the United States, the gist of which clearly was the impairment and impeding of the lawful function of the official inspection system relating to the sale of eggs to the Army, Navy and The War Shipping Administration. The proof of the commencement of the conspiracy and its continuance up to the year 1943, rested wholly on the testimony of two former employees, Pineda and Andrade. Their testimony was confined wholly to recitals of varied incidents of purported frauds upon the official inspection system of the Army and Navy with reference to the sale of eggs to those two government agencies.

The War Shipping Administration although created in February 1942 was not all referred to in any manner whatever in this part of the proof. Significantly, there was no evidence submitted to prove the filing of any false voucher for the entire period from 1938 to and including the year 1942. The persons to whom the Pineda and Andrade testimony related were Berman and Goddard, Menges (who was acquitted on all counts) and Moncharsh.

The proof of the alleged continuing conspiracy for the years 1943 and thereafter was of a distinctly different character and related only to Berman and Goddard. Substantially, the proof related wholly to deliveries of inferior eggs and in several instances short weight cheese to seventeen merchant ships operated on behalf of the War Shipping Administration. Much of the "proof" of deliveries of inferior merchandise was based on evidence of the condition of eggs at times long subsequent to their inspection or delivery, the admission of which was gravely prejudicial to the defendants and patently erroneous under the rule of *Parlton* v. *United States*, 75 F. 2d 772. Singularly, the proof did not relate to any circumvention of the official inspection system and did not concern either the Army or the Navy. Thus, there was no proof of any fraud practiced upon the government's inspection system nor of a single transaction relating to the Army or Navy. The proof was confined to evidence of the filing of false vouchers with the War Shipping Administration resulting from the delivery of the aforementioned inferior merchandise.

The prosecution's evidence, if believed, established two separate and distinct conspiracies—distinct as to time, character and persons. The first purported to implicate Berman, Goodard, Menges and Moncharsh in a conspiracy to defraud the United States by impeding and impairing the government's inspection system with relation to sales of eggs to the Army and Navy during the years 1938 to 1942 inclusive. The second, commencing in November 1943 to and including December 1944, embraced Berman and

Goddard alone in a conspiracy to commit offenses against the United States, i.e., the filing of false vouchers with the War Shipping Administration.

The prejudice to Moncharsh by reason of the variance lies in the fact that the jury may well have convicted him on the conspiracy count wholly on the evidence relating to the actions of Berman and Goddard with reference to the filing of false vouchers with the War Shipping Administration in 1943 and 1944 with which Moncharsh was not shown to be connected or implicated. The jury might well have disbelieved the contradicted and vague testimony of Pineda and Andrade and predicated their verdict of guilt as to Moncharsh on the conspiracy count wholly on the proof for the 1943 and 1944 period. By charging a continuing conspiracy the jury was permitted to attribute criminal responsibility to Moncharsh, as an alleged co-conspirator for the actions of Berman and Goodard with which the proof did not directly or indirectly connect him.

III. A. The conviction of Moncharsh for the commission of the substantive offenses of filing false vouchers with the War Shipping Administration in April and May 1944, cannot be sustained on the rule of *Pinkerton* v. *United States*, 328 U. S. 640, for the reason that the case was not submitted to the jury on the theory of that case. In the trial court the substantive counts were submitted to the jury with definite instructions that in order to convict, the jury would have to find beyond a reasonable doubt that Moncharsh either participated in the commission of the charged offenses or aided or abetted them. For all practical purposes, the government has conceded the lack of evidence to hold Moncharsh as a participator in the offenses so that his conviction must have been rested on the accessory theory. But the Court of Appeals has affirmed his conviction as an aider and abettor not on evidence but on the reasoning that the rule of the *Pinkerton* case supports that finding. However, the rule of the *Pinkerton* case outlines a theory of criminal responsibility distinctly different from

the two theories upon which the case was submitted to the jury, namely, the theory of conspiratorial guilt whereby responsibility is imputed to all members of a conspiracy for acts committed by any member of the conspiracy during its existence and in furtherance of it. In order to apply such a theory, it is necessary for a specific instruction embodied in the *Pinkerton* case be given to the jury directing them to find that (a) the substantive offenses were acts committed in furtherance of the conspiracy or the object thereof, and (b) that the charged conspiracy was in existence at the time the substantive offenses were committed before criminal guilt can be imposed upon an alleged member of the conspiracy who neither participated in the offenses nor aided or abetted them. Such a charge was given by the trial court in the *Pinkerton* case and was pointedly noted by this Court in its decision affirming the convictions there. Thus, the jury findings present in the *Pinkerton* case are absent here. The Court of Appeals in its desire to apply the *Pinkerton* rule to the facts of this case supplied the necessary findings acting on its own review of the record, thereby indulging in a practice of spelling guilt from the record which has been repeatedly condemned by this Court. *Bollenbach* v. *United States*, 326 U. S. 607; *Kraus & Bros.* v. *United States*, 327 U. S. 614; *Bihn* v. *United States*, 328 U. S. 633; *Kotteakos* v. *United States*, 328 U. S. 750.

Another basic distinction which prevents the application of the *Pinkerton* rule to the instant case lies in the fact that the conspiracy charged in the *Pinkerton* case was one to commit the very offenses which were separately described in the substantive counts of the indictment. Here, however, the conspiracy was not one to commit the offenses charged in the substantive counts, but rather was a conspiracy "to defraud" the United States. Thus, while it is conceivable that in the *Pinkerton* case there was a direct relation between the unlawful agreement to commit the offenses made substantive crimes therein and the actual

commission of the offenses, it is not possible to reach the same conclusion here. For if the conspiracy in the instant case were one to file false vouchers with the War Shipping Administration in April and May 1944 and was formed for that very purpose, it would have been proper for the prosecution to have so charged. That the prosecution refrained from so doing is not accidental; if the indictment had attempted to describe such a conspiracy it would be impossible for it to charge Moncharsh as a defendant, because the only evidence in the whole case tending to implicate him in an unlawful agreement came from the lips of two ex-employees and related only to alleged conduct in defrauding the lawful function of the official inspection system of the government in connection with inspection of eggs for the Army and Navy some two years prior to the commission of the substantive offenses. There is no evidence of any character connecting Moncharsh with the commission of the substantive crimes. To apply the *Pinkerton* rule here in a case where the commission of the substantive offenses was not the avowed object of the conspiracy would extend the principles of conspiratorial guilt into the realm of constructive guilt, and guilt by association. There is nothing in the rationale of the *Pinkerton* rule when properly analyzed which would support the perversion of that rule indulged in by the Court of Appeals in order to justify the conviction of Moncharsh for crimes which he did not, in fact, commit and with which the evidence wholly failed to connect him in a principal or accessory capacity.

B. The technique of the government as disclosed in its brief in opposition (Br. Opp. 10-13) is to abandon at this point the position it assumed in the Court of Appeals, namely, reliance upon the *Pinkerton* rule, and to endeavor to justify the conviction of Moncharsh for the substantive offenses on the theory that he was an aider and abettor of them. Thus, the government has shifted its position to suit the forum. But in order to justify his conviction as an aider or abettor, we submit, there must be some substantial

evidence upon which the jury could have drawn the inference that he aided, abetted, counseled, commanded, induced or procured the filing of the false vouchers with the War Shipping Administration as charged in the substantive counts of the indictment. The proper concept of aiding or abetting would require that with reference to the separate crimes of filing false vouchers with the War Shipping Administration there must be substantial evidence that Moncharsh in some sort associated himself with the offenses, that he participated in them as something that he wished to bring about, and that he sought by his action to make it succeed. There must be substantial proof that he evidenced a purposive attitude towards the commission of those offenses. However, the evidence in this case wholly fails to bring Moncharsh within the compass of the substantive crimes in any capacity. It is impossible to establish any connection between his alleged activity with reference to impeding the lawful function of the inspectors of the Army and Navy with reference to inspection of eggs in the years 1938 to 1942 and the filing of false vouchers with the War Shipping Administration some years later. The only possible connection between the two lies in the theory of a continuing conspiracy and not in the common law theory of aiding and abetting. Thus, while the evidence from which an inference of misconduct on the part of Moncharsh can be drawn for the years 1938 to 1942 with reference to such inspections by Army and Navy inspectors, it cannot be held that the same evidence is proof of his aiding and abetting the distinct and separate crimes committed by persons other than himself some two years later. In this connection it is difficult to discern any distinction between the argument advanced by the government in support of its contention that Moncharsh is an aider or abettor and that which would be advanced by it had it sought to justify the action of the Court of Appeals in affirming his conviction on the conspiratorial theory contained in the *Pinkerton* rule. In sum, to support the view of the government would

be to merge the theory of aiding and abetting with that of conspiratorial responsibility.

ARGUMENT.

This is a case where a defendant has been convicted of six separate crimes of filing false vouchers with an agency of the government in the absence of any evidence whatever that he participated in the commission of those crimes, or aided in their commission, solely on a mechanical rule of law upon which the case was not submitted to the jury. That rule of law is one of conspiratorial guilt imputing to all members of a conspiracy responsibility for the acts of one another committed during its existence and in furtherance of it. While it is not necessary to here challenge the rationale of *Pinkerton* v. *United States* which embodies the rule, the case at bar presents a vivid example of the confusion resulting from an effort to employ the rule to justify a conviction which was brought about after a lengthy prosecution of a dragnet and catch-all conspiracy charge. Now, that conviction is sought to be rested on other grounds, namely, the aiding and abetting theory as distinguished from the conspiratorial theory. The evident misconception existing in the minds of both the Court of Appeals and the trial judge when confronted with the necessity of analyzing the conspiracy doctrine is eloquent testimony in support of the contention, repeatedly made in the past, that the employment of the conspiracy statute in many instances achieves the result of befuddling the mind of the lay juror to the point where convictions are arrived at without recourse to the fundamental standard of personal guilt of a charged offense beyond a reasonable doubt.

In essence this is a case where the jury could not have convicted Moncharsh for the substantive crimes on the two theories of law upon which the case was submitted to them. When the conviction was challenged in the Court below the government advanced the rule of *Pinkerton* v.

United States as the only ground upon which it could have been rested, so that for all practical purposes the absence of any evidence to support the two theories upon which the case was actually submitted was conceded by the government in the Court below. Now, however, the government has reversed its position and seeks to justify the conviction on one theory of law on which the case was submitted to the jury in the trial court, namely, the aiding and abetting theory. It would appear, therefore, that the government has admitted the error which exists in the action of the Court of Appeals and which is so apparent in its opinion.

I. The Pinkerton Rule Was Erroneously Applied by the Court of Appeals to Sustain the Action of the Trial Court in Permitting the Jury to Consider Evidence of Other Offenses With Which Moncharsh Had No Connection in Determining His Guilt for the Offenses Charged in the Substantive Counts of the Indictment With Which, Also, He Had No Connection.

As outlined in the Statement (pp. 14-20) the prosecution introduced evidence of the delivery of inferior products to one merchant vessel in November 1943 and to seventeen such ships in the year 1944, each delivery involving an allegedly false invoice. The 1944 transactions, with one exception, were all confined to the months of April and May, 1944. Six of them were charged as separate substantive offenses (counts II to VII). Evidence of all the other transactions was received under the conspiracy count. Thus, in addition to the offenses described in the six substantive counts of the indictment there was evidence of twelve other similar offenses.

At the conclusion of the government's case it was moved that all evidence relating to deliveries of eggs "on ships other than those mntioned in the substantive counts" be made applicable to all of the substantive counts as similar offenses for the purpose of proving intent with the single

exception of the evidence relating to the delivery to the *Hawaiian Shipper* in December, 1944 (R. 3342). The motion was opposed at that time and was not granted (R. 3343-3361).

At the conclusion of all the evidence in the case, however, the same motion was renewed by the government and at this time it was granted (R. 4354-4355). Thus, evidence of the other offenses was admitted against all of the defendants, including Moncharsh. Pursuant to the motion, the trial court charged the jury that (R. 4377):

> "Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to that charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose."

This instruction as given was objected to by the defendants (R. 4384-4386).

A. The trial court erred in admitting against Moncharsh evidence of the commission of similar offenses other than those described in the indictment as bearing on the intent with which he committed the substantive offenses set out in the indictment, for the reason that there was no evidence in the record connecting him with the commission of either set of offenses.

The singular fact disclosed by the record in this case is that the prosecution wholly failed to connect Moncharsh with the delivery of eggs to the eighteen specific merchant vessels covered in the proof. As we have observed in the Statement (*supra*, pp. 6-7, 14-15) sales to the shipping companies was a phase of the business with which he had no direct connection. The only transaction relating to a delivery of eggs wherein the name of Moncharsh was even mentioned was that concerning the S. S. *William Clark*

in November 1943, where, as we have noted (Statement, pp. 16-17), his only participation was limited to the receipt of a telephone complaint long after the eggs were put aboard the vessel, and his direction of an immediate investigation of it. This evidence was not such as to permit an inference of fraudulent conduct on his part with reference to that delivery. All of the transactions involving the delivery of eggs which occurred in the year 1944 involved only two of the defendants, Berman and Goddard, without any evidence whatever that Moncharsh participated in these transactions in any manner, or aided or abetted them, or even knew of them. Actually, he never saw the purchase orders relating to these deliveries, nor discussed them, nor discussed the products used to fill them, nor participated in any degree in the manner or method of filling and delivering the orders.

The rule governing the admission of evidence of offenses other than those charged in the indictment for the purpose of proving intent naturally assumes that the accused must be shown to have some connection with the other offenses which are so proffered. The rule has been succinctly summarized by Wharton who, after referring to the odium connected with the criminal conviction states the following (1 Wharton's *Criminal Evidence* [11th ed.] p. 568-569):

> "These momentous consequences demand a vigorous enforcement of the rule, in criminal charges, that evidence of the collateral offense must never be admitted, unless it can be applied to more certainly demonstrate the truth. Hence: (a) Ground must first be laid implicating the accused in the charge under trial, and unless sufficient evidence of this has been, in the opinion of the trial judge, first adduced, all evidence of other offenses must be excluded; (b) The collateral offense cannot be put in evidence without proof that the accused was concerned in its commission; (c) There must be identity of person or crime, scienter, intent, system, or some integral parts of the exceptions established between the charge under trial and that sought

> to be introduced, that clearly connects the accused, showing that the person who committed the one crime must have committed the other. In other words, some connection between the other crime and the crime charged must be shown and it must be shown with reasonable certainty that the accused committed the other crime."

Common sense alone would support such a requirement. Moreover, there are cases which hold, not alone that the defendant must be connected with the other offenses, but that his complicity therein must be established by clear and convincing proof. *Paris* v. *United States*, 260 F. 529; *Gart* v. *United States*, 294 F. 66. And by implication this latter requirement is the law of the Ninth Circuit. See *Henderson* v. *United States*, 143 F. (2d) 681, 683. See also, *State* v. *Ebel*, 92 Mont. 413, 15 P. (2d) 233; *Scott* v. *State*, 107 Ohio St. 475, 141 N. E. 19.

This case, therefore, presents the unique situation of admitting against a defendant, to prove his own guilty intent with respect to substantive offenses which he did not commit except constructively (i.e., on the *Pinkerton* theory), evidence of similar offenses committed by others. Constructive criminal intent is thus superimposed on constructive criminal guilt—and a sentence of five years of imprisonment and fines of $30,000 is rested on such a foundation. Diligent research on our part has failed to reveal any decision (other than the opinion below) which holds that evidence of similar offenses by co-defendants in which the particular defendant is not shown to have participated are admissible to prove his intent in respect of still other offenses which he is not shown to have committed in fact; and we are confident that none can be found.

B. *The instruction of the trial court on the subject of consideration of evidence of other offenses for the purpose of determining intent was prejudicially erroneous.*

In charging the jury, the trial court delivered a terse and cryptic instruction on the question of the admission of

evidence of offenses similar to those charged in the indictment for the purpose of proving intent. That instruction has been set forth, *supra*, p. 33, and is obviously misleading because it failed to correctly state the rule of law applicable thereto. Thus, it could only result in confusing an already confused situation.

While the general rule is that evidence of another crime is not admissible to prove the crime charged, the rule is subject to a number of exceptions. See *Tedesco* v. *United States*, 118 F. (2d) 737 (C. C. A. 9), citing numerous authorities. A well known exception is that evidence of other offenses committed by an accused is admissible to show criminal intent with reference to the offense charged in the indictment where intent is an element of the charged offense and where the other offenses are similar to and not too remote from that charged in the indictment. *Weiss* v. *United States*, 122 F. (2d) 675, 681-685 (C. C. A. 5). The rule requires, however, that as a necessary condition precedent before the similar offenses may be considered, the offense charged in the indictment must be conceded or proved. Thus, in the *Weiss* case the Court, after discussing the applicability of the rule to cases where intent is an element of the offense charged, observes:

> "In proving intent by other similar offenses, the act is conceded or assumed or left to the jury; what is sought is the state of mind that accompanied it, *and the jury are instructed not to consider the evidential instances of other similar offenses until they find the act to have been done and are proceeding to determine the intent.*" (Italics added).

That the charged offense must first be proved before the jury can properly consider evidence of other offenses is quite clearly the prevailing rule which should have governed here. 2 Wigmore, *Evidence* (3rd ed.) Sec. 302. After examining the collected authorities, Wigmore states:

> "It will be seen that the peculiar feature of this process of proof is that the *act itself is assumed* to be done

—either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent."

It will be seen, therefore, that under the rule permitting the consideration of offenses similar to those charged in the indictment for the purpose of ascertaining intent, the trial judge should have instructed the jury that evidence of offenses other than those charged in the indictment could be considered by them for the purpose of ascertaining intent only after the jury had found that the substantive crimes had been committed by each or all of the defendants.

Moncharsh was obviously prejudiced, since there was no evidence from which the jury could have found that he was implicated in the substantive offenses either as a participant or as an aider or abettor. Moncharsh's guilt of the substantive counts rests, not on evidence, but on an extension of the *Pinketron* doctrine (an improper and unwarranted extension, as we point out below, pp. 46-60). Since, therefore, Moncharsh did not in fact commit the substantive offenses, and since he did not in fact commit any of the similar offenses not alleged in the indictment but introduced into evidence, it was obviously prejudicial error to permit evidence of the latter to go to the jury as evidence of the "intent" with which he "committed" the former. Guilt by association and constructive guilt could hardly be carried farther with prejudice to a particular defendant than they have been carried here.

The instruction given was clearly a misstatement of the law, was bound to have had only a confusing effect upon the jury, and improperly weighted the scales against Moncharsh. It was an instruction on a vital element in the case, namely, the commission of the substantive crimes; under decisions of this Court, it requires a reversal of the judgment in this case.

The importance of correct instructions in a conspiracy trial such as this cannot be overemphasized. As this Court stated in *Kotteakos* v. *United States*, 328 U. S. 750, 776-777):

> "Here, if anywhere, cf. *Bollenbach* v. *United States*, *supra*, extraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, so far as possible, from loss of identity in the mass. Indeed the instructions often become, in such cases, his principle protection against unwarranted imputation of guilt from other's conduct. Here also it is of special importance that plain error be not too readily taken to be harmless."

When this point was presented to the Court of Appeals it was disposed of in favor of the government wholly on the basis of the rule of *Pinkerton* v. *United* States. Specifically the Court of Appeals stated (R. 4627-4628):

> "This contention ignores the evidence indicating that Moncharsh participated in a conspiracy, in furtherance of which the acts charged in the substantive counts and the prior offenses were committed. This evidence establishes Moncharsh as an instigator of such acts and offenses, which thereby became admissible against him in determining his guilt under the substantive counts. *Pinkerton* v. *United States*, 328 U. S. 640."

The apparent error of the Court of Appeals in confusing the conspiratorial theory of the *Pinkerton* case with the common law theory of accessory before the fact, i.e., aider and abettor, is noted here and is fully discussed *infra*, pp. 46-60. The original error of the court below in seeking to justify conviction of Moncharsh on the substantive counts on the *Pinkerton* rule has quite evidently led it into this further mistaken position. The reach of the conspiracy statute has indeed been widened when, as in this case, it can be employed to permit evidence of offenses other than those charged in the indictment and with which a defendant is shown to have no connection whatever to be

considered by the jury for the purpose of ascertaining the "intent" with which he "committed" the substantive offenses charged in the indictment, offenses which under the proof here he did not commit. We believe that the error of which we complain highlights the present case as a frightening warning of the confusion engendered even in trained judicial minds when, pursuant to a dragnet conspiracy charge, guilt is sought to be imposed by constructive and vicarious means rather than by accepted standards of personal participation. The result below flies directly in the face of this Court's stern admonition in the *Kotteakos* case (328 U. S. at 772), that "Guilt with us remains individual and personal, even as respects conspiracies."

The concern of the Judicial Conference, expressed over twenty years ago, has here been fully realized:

> "Further, the rules of evidence in conspiracy cases makes them most difficult to try without prejudice to an innocent defendant."[5]

II. There Was a Variance Prejudicial to Moncharsh Between the Conspiracy Charged in the Indictment and the Proof in That the Evidence Tended to Show the Existence of Two Separate Conspiracies of Different Character and Involved Different Persons.

The conspiracy as charged in the indictment was alleged to be a continuing one from January 1, 1938, to and including the date of the return of the indictment, June 20, 1945. It was described as a conspiracy to defraud the United States in the manner and means specified therein. Obviously, the gist of the indictment was the circumvention of the government's inspection system with relation to the sale of eggs to the three designated governmental

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[5] Recommendations of the Senior Circuit Judges, Rep. Att'y Gen. (1925) 5-6, cited by the Court in *Pinkerton* v. *United States*, 328 U. S. 640, 644, n. 4.

agencies, namely, the Army, the Navy, and the War Shipping Administration.

At the close of the government's case, the defendants moved for a directed verdict on the ground *inter alia* that there was a fatal variance between the conspiracy as charged in the indictment and the proof thereof (R. 3345-3361). The motion was denied (R. 3362).

In affirming the action of the trial court in denying the motion, the Court of Appeals nevertheless observed (R. 4615):

> "Since the acts connecting Moncharsh with the conspiracy occurred mainly in the period before 1943, it is doubtful whether such a variance as it exists, could be treated as immaterial under *Berger* v. *United States*, 295 U. S. 78."

In the view of the Court below, however, the variance did not exist since "all misconduct of defendants was germane to one consistent and persistent course of wrongdoing." We propose to demonstrate that the holding of the Court below was in error in that the variance did exist and that it was prejudicial to Moncharsh.

Upon analysis it is clearly apparent that the proof adduced in support of the alleged continuing conspiracy divides itself naturally into two categories separated one from the other as to time, persons and character, and that the dividing line between them was the year 1943.

In order to support its contention that the conspiracy originated in 1938 and to prove the existence thereof up to the year 1943, the prosecution was required to rest its entire case for those years on the testimony of two former employees, Pineda and Andrade. The testimony given by these two witnesses was confined wholly to varied incidents of alleged circumvention of the official inspection system of the Army and the Navy with reference to the

sale of eggs to those two government agencies.[6] Although the War Shipping Administration was created in February 1942 and the company was a supplier of eggs, butter and cheese to the private steamship companies designated as general agents for the War Shipping Administration from the time of its creation, there was no evidence whatever relating to any fraudulent conduct on the part of any defendant in connection with such sales—prior to November, 1943.

It is significant that the government wholly failed to prove the submission of any false vouchers for the entire period from 1938 to and including the year 1942. It will be further noted that testimony of Pineda and Andrade was of such a character as to preclude not only the prosecution but also the defense from ascertaining the particular order of eggs to which their testimony purported to refer so that necessary documents covering such order could be produced in evidence. It is further significant that the persons to whom their testimony related were Berman, Goddard, Menges (who was acquitted on all counts), and, occasionally, Moncharsh.

The evidence adduced in support of the alleged continuing conspiracy for the year 1943 and 1944 is of a distinctly different character than that for the prior period of time. The evidence no longer tended to indicate any circumvention of the inspection system of the Army and Navy and it no longer related to sales to those two agencies of the government although the company was supplying large quantities of merchandise to both of them. The evidence related wholly to specific deliveries of inferior eggs and in some few instances of short-weight cheese to merchant vessels operated by private steamship companies on behalf of

[6] There was one isolated incident related by Pineda pertaining to purported circumvention of the inspection of butter designated for sale to the Army which was contradicted and considerably weakened by cross-examination on this head. (R. 903-1026, 1300-1305).

the War Shipping Administration. It is significant that only two of the defendants, Berman and Goddard, were implicated in these transactions.

Succinctly summarized, the evidence for this period of time covered a delivery of eggs to one merchant vessel in November 1943, to sixteen merchant ships in April and May 1944, and to one vessel in December 1944. In each instance the evidence tended to show that the merchandise did not conform in grade and size to the specification set forth in the voucher accompanying the deliveries without relation to the prior inspection conducted by the Department of Agriculture on behalf of the War Shipping Administration.

There was no relation between the character of the proof relating to the years 1943 and 1944 and that pertaining to the period 1938 to 1942 inclusive. For the prior period of time, the evidence was confined to isolated instances of purported circumvention of inspection of eggs by Army and Navy representatives. The evidence for the subsequent period, i.e., 1943 and 1944, related wholly to specified deliveries of inferior merchandise to shipping companies acting as general agents for the War Shipping Administration resulting in the filing of false vouchers with that agency. In the former period, therefore, there was not a whisper of a false voucher; in the latter period there was not a mention of a fraud upon the official inspection system of the War Shipping Administration.

It is plainly apparent, therefore, that the continuity of the alleged conspiracy lay wholly in the mind of the pleader and not in the proof. The indictment was obviously drawn for the purpose of reaching Moncharsh through the testimony of Pineda and Andrade, a purpose which could be accomplished only if the conspiracy was broadly alleged to be one "to defraud the United States" rather than one "to commit an offense against the United States." (See pp. 53-56, *infra*). The government's proof, if believed, established two separate and distinct conspiracies. The

first embraced Berman, Goddard, Moncharsh and Menges in an unlawful agreement to defraud the United States by impeding and impairing the government's inspection system with relation to sales of eggs to the Army and Navy from 1938 to 1942 inclusive. The second embraced Berman and Goddard alone in an unlawful agreement to commit offenses against the United States, namely, the filing of false vouchers with the War Shipping Administration, commencing in November 1943 to and including 1944.

The prejudice to Moncharsh by reason of the proof of two separate and distinct conspiracies lies in this: The jury may well have convicted him on the conspiracy count solely on the evidence relating to the deliveries of inferior merchandise to the War Shipping Administration vessels in 1943 and 1944 with whic. Moncharsh was not shown to be connected or implicated. By contrast with the vague and often elusive evidence elicited from the witnesses Pineda and Andrade with respect to the Army and Navy transactions, the evidence relating to the War Shipping Administration transactions was specific, detailed and persuasive. Moreover, it should be noted that if the testimony of Pineda and Andrade was accepted as being credible they were self-confessed accomplices and the jury was warned that such testimony should be "received with caution. The jury should not rely upon it unsupported unless it produces in their minds the conviction of its truth." (R. 4374). The jury's acquittal of Menges who, like Moncharsh, was implicated only by the testimony of Pineda and Andrade, is not without significance.

It is entirely consistent with the record to observe that the jury might well have disbelieved the contradicted and vague testimony of Pineda and Andrade and predicated their verdict of guilty as to Moncharsh on the conspiracy count wholly on the evidence of the activities of Berman and Goddard in 1943 and 1944. Reverting to the living scene, we note that the jury after retiring for its deliberation, returned with a request to the Court for a reading

of testimony relating to the delivery of eggs to a merchant ship in May, 1944 (R. 4387-4390). Quite obviously the jury was interested in and impressed with that part of the government's case relating to the War Shipping Administration transactions. Under these circumstances, we submit, that "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger* v. *United States*, 295 U. S. 78, 79.

In sum, the record strongly suggests that Moncharsh was convicted of conspiracy to defraud the United States by impeding the inspection systems of the Army and Navy, not on the basis of the testimony of two discharged and obviously disgruntled ex-employees which alone connected him with that conspiracy, but because the jury was convinced that Goddard and Berman delivered undersize and undergrade eggs to steamship companies who were acting as General Agents for the War Shipping Administration.

In this connection, it is important to note that a very considerable amount of evidence concerning the condition of eggs at various periods of time after delivery was tendered by the prosecution and admitted into evidence over vigorous objection. (E.G., R. 548, 603, 1518-1524, 1549-1555, 1592-1600, 2642-2726.)

This evidence chiefly related to the shipment of eggs during the months of April and May, 1944, and December, 1944 to the steamship companies under contract with the War Shipping Administration. In these instances, there was no proof whatsoever of the condition of the eggs at the time they left Nye & Nissen's plant. It is proper to conclude that they were deposited for indefinite periods of time on the docks awaiting delivery to the ship, that they were subjected to the ordinary vicissitudes of truck transportation, exposed to temperature changes, and deposited on the vessels. It would be difficult indeed in each instance to trace in detail the exact movement of the eggs or the condition to which they were subjected.

It is submitted that this evidence was erroneously admitted by the trial court not alone because of its remote nature, but also because the admission of such evidence tended to raise a presumption of a prior condition without accounting for what happened to the eggs in the interim, resulting in confusing the jury and causing prejudice to the petitioner in that the jury was thus permitted to draw inferences that were not warranted in the premises. The very nature of the commodity—the fact that eggs are subject to constant change by their very nature and always change to their detriment, cannot be ignored. This contention was rejected by the Court of Appeals with this observation (R. 4620):

> "The admission and refusal to strike this testimony is complained of as error on the ground that since eggs are highly perishable, no inference as to their condition at a prior time may be based upon evidence of their condition at a subsequent time. We are not persuaded, however, that the quality of an egg which is handled in the manner in which such commodities are ordinarily handled is as unstable as a soap-bubble or as fugitive as the frost on a window pane. 'Where the condition is of such character that a brief lapse of time would not affect it materially, the subsequent existence of the condition may give rise to an inference that it previously existed . . . Any intrinsic weakness in such evidence goes to its weight rather than its admissibility . . .' *F. W. Woolworth Co.* v. *Seckinger* (C. C. A. 5), 125 F. 2d 97, 98.

This answer, we earnestly submit, is not dispositive of the issue. The undisputed evidence in the case both from expert witnesses called by the defense and from government witnesses, including Colonel Hand, shows clearly that eggs may deteriorate as much as a full grade within a period of twenty-four hours time (R. 4212, 634). Naturally if eggs are retained in refrigeration or out of the heat or free from motion it might well be that their grade or character would not change in a brief period of time.

The fact that these eggs were in motion and were removed from the protection of refrigeration and subjected suddenly to substantially higher temperatures and moved about by truck and left exposed to the elements and such motion as one might expect in hurried movements on vessels designed for overseas service in war materially alters the situation. Evidence was admitted relating to the condition of eggs not alone days after the delivery of them where they had passed through such motion and changes as hereinbefore indicated but in some instances involving a period of time approaching two weeks subsequent thereto. The *Seckinger* case relied upon by the Court of Appeals had to do with a presumption that a wooden floor on a given date might be presumed to be in the same condition a short time previously. This is hardly apposite to the facts involved in the instant case. We contend that the proper rule governing here is correctly stated in *Parlton* v. *United States*, 75 F. 2d 772 (App. D. C.), the application of which rule would clearly exclude evidence of this nature. We believe the introduction of this evidence was erroneous and it would seem patent that it was prejudicial in nature and requires reversal.

III. There Is No Basis for the Conviction of Moncharsh for the Commission of the Substantive Offenses Either Under the Rule of Pinkerton v. United States or on the Theory That He Was An Aider and Abettor.

A. *The rule of* Pinkerton *v.* United States *was not proposed in the trial court where a specific instruction requesting findings of fact should have been given to the jury.*

In submitting that phase of the case relating to the substantive counts to the jury, the trial court specifically instructed the jury that in order to return a verdict of guilt as to any defendant it would be necessary for them to find evidence of (1) direct participation in the commission of

the crimes or of (2) aiding or abetting the commission of the crimes. The instructions were as follows (R. 4366-4367, 4368):

"I instruct you that in connection with counts two to seven, inclusive, that the mere fact that one is an officer or employee of a corporation does not render him criminally responsible for the acts of other officers, agents or employees of the corporation, unless the evidence establishes beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment.

"The defendants are here charged only with those things which are set out in Counts I to VII, inclusive, of the indictment. They are not to be tried upon any other issue.

"In order to sustain a conviction of any defendant on any of the substantive counts, the Government must prove beyond a reasonable doubt each and every material allegation of such counts.

"The government must prove beyond a reasonable doubt:

"First, that the invoices described in the substantive counts are in fact fraudulent and fictitious,

"Second, that the defendants knew such invoices were at the time fraudulent and fictitious,

"Third, that the invoices pertained to matters within the jurisdiction of a department or agency of Government,

"Fourth, that the defendants intentionally used or caused to be made and used false and fictitious invoices in the manner set forth in the indictment, and,

"Fifth, that the defendants in using the invoices at that time, did so with criminal intent, that is to say with the intent to defraud and deceive.

"Failure to prove any one of these five essential elements beyond a reasonable doubt as to any or all of

the defendants will entitle such or all of the defendants to an acquittal at your hands."

* * * * * * *

"In determining whether each of the defendants made or used these invoices, or caused them to be made or used, it is not required that you find that each defendant saw or handled the invoices or were present when they were made. One who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly. Consequently, if you find that one or more of the defendants aided, induced, or otherwise procured the making or using of these invoices, then you must find that they caused them to be made or used within the meaning of the statute."

Concededly there was no evidence from which the jury could draw an inference of participation in the substantive offenses on the part of Moncharsh. Furthermore, as we propose to develop below, there was no evidence from which the jury could draw an inference that Moncharsh aided, abetted, counseled, commanded, induced or procured the commission of the substantive offenses. Nevertheless the jury returned a verdict as to him of guilty on all of the substantive counts, and the trial court imposed a sentence of five years imprisonment and $30,000 in fines on these counts, the sentences to run concurrently with the sentence of two years and $5,000 fine imposed on the conspiracy count conviction.

In the Court of Appeals, however, the rule of the *Pinkerton* case was advanced by the government for the first time in justification of the conviction of Moncharsh for the substantive crimes. In affirming that conviction, the Court of Appeals wholly rested its ruling on the *Pinkerton* rule. In its opinion the Court stated that (R. 4616, 4618):

"Since the evidence justifies a finding that the substantive offenses which are the subjects of Counts II through VII were committed in furtherance of a continuing conspiracy of which Moncharsh was a member, it should follow that the evidence is also sufficient to

support a finding of Moncharsh's guilt on those counts under the rule in Pinkerton *v.* United States, 328 U. S. 640. Appellant Moncharsh does not contend that he had withdrawn from the conspiracy before the substantive offenses were committed, but seeks to avoid the force of the Pinkerton case on other grounds. . . .

"Whatever the answer to this problem may be, we are of the opinion that the verdict of the jury on the substantive counts did not disregard or go beyond the scope of the instructions given. Appellants' contention to the contrary is answered by the Pinkerton case itself.

"So long as the conspiracy existed, the members acted for each other in carrying it forward. The criminal intent to commit substantive offenses in furtherance of the unlawful project was established by the formation of the conspiracy. 'Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. *The rule which holds responsible one who counsel, procures, or commands another to commit a crime is founded on the same principle.*' (Emphasis supplied.) Pinkerton *v.* United States, 328 U. S. 647."

But there is basic and substantial distinction between this case and the *Pinkerton* case which the Court of Appeals failed to consider. It is this: That in the *Pinkerton* case, even though some of the substantive offenses were set out as overt acts in the conspiracy count and were separate violations of the statutes described in the conspiracy count, the trial court submitted them to the jury with the specific charge that before a verdict of guilty could be returned against one who played no actual part in the commission of the substantive offenses the jury must find beyond a reasonable doubt that (a) the substantive offenses were acts committed in furtherance of the conspiracy or the object of the conspiracy, and (b) that the unlawful conspiracy was in existence at the time the substantive offenses were committed. That charge was distinctly different from

the charge in this case and outlined a wholly different theory of law, namely, the conspiratorial theory. In its consideration of the *Pinkerton* case, this Court pointedly noted that charge (328 U. S. 640, 645, 646, n. 6):

> "The trial court charged: '. . . after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed.' Daniel was not indicted as an aider or abettor (See Criminal Code, 332, 18 U. S. C. 550), nor was his case submitted to the jury on that theory."[7]

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[7] The government, also, clearly recognized the import of the instruction given by the trial court. In the Brief for the United States filed in the *Pinkerton* case in this court the following significant statement is made (Br. for United States, No. 719, October Term 1945, p. 20):

> "Daniel's guilt on the substantive counts here involved rests upon the trial judge's instruction to the jury that if they found that at the time the substantive offenses were committed petitioners were in an unlawful conspiracy and that the substantive offenses charged were committed in furtherance of the conspiracy or its objects, each petitioner could be found guilty of the substantive offenses. The circuit court of appeals appears to have approved this theory of guilt. We believe that the theory is correct and *that on that basis the instruction furnished the jury with a proper standard for ascertaining Daniel's guilt of the substantive offenses.*" (Italics ours)

In delivering the opinion of the Court, Mr. Justice Douglas recognized the theory of law upon which the substantive counts were submitted to the jury in the following language:

> ". . . The question was submitted to the jury on the theory that each petitioner could be found guilty of the substantive offenses if it was found at the time those offenses were committed petitioners were parties to the unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it" (328 U. S. 640, 645).

The majority opinion further emphasized the importance of these jury findings with the following observation:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement" (328 U. S. 640, 647).

Admittedly, therefore, the jury findings which were present in the *Pinkerton* case and upon which the rule thereof is predicated are absent in this case. Nevertheless, the Court of Appeals affirmed the conviction of Moncharsh on the assumption that the evidence justified the finding in the Court of Appeals that the substantive offenses were committed in furtherance of the conspiracy of which Moncharsh was a member. In so doing, the Court of Appeals has not only usurped the function of the jury in a criminal trial but has ignored the right of Moncharsh to have the factual issues to which we have previously alluded determined by the jury and the jury alone, which if it had been so requested might well have acquitted him on all of the six substantive counts. The practice of spelling guilt from the record has been one which has been condemned by

this Court in a number of recent decisions. *Bollenbach* v. *United States*, 326 U. S. 607 (1946); *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Bihn* v. *United States*, 328 U. S. 633 (1946); *Kotteakos* v. *United States*, 328 U. S. 750 (1946). As this Court has stated in the *Kotteakos* case:

> ". . . It is not the appellate court's function to determine guilt or innocence . . . nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error." 328 U. S. 750, 763-764.

In its desire to apply the rule of the *Pinkerton* case, the Court of Appeals has quite definitely indulged in this proscribed practice, which, in any view, cannot be condoned since, "Such a course would lead to serious intrusions on the historic function of the jury under our system of government." *Bihn* v. *United States*, 328 U. S. 633, 639.

The proposition which we here advance may be expressed as a simple but searching question: Is is necessary for factual findings to be made that (1) a conspiracy was in existence at the time the substantive offenses were committed to which Moncharsh was a party; and (2) that the substantive offenses were committed in furtherance of that conspiracy before guilt can be imposed upon him for the offenses committed by other members of the alleged conspiracy if there was no evidence that he participated in, aided, abetted, counseled, commanded, induced, or procured the commission of those offenses?

If the answer to the question is an affirmative one, as we believe it must be, then the next question naturally proposed is this: by whom must those facts be found?

We believe the answer to this question is self-evident—it is the function of the jury and the jury alone.

In short, if liability for the offenses committed by others is sought to be imposed upon Moncharsh on the conspiratorial theory, it was a necessary concomitant for the jury to find beyond a reasonable doubt that those offenses were committed in furtherance of the conspiracy and that Moncharsh was a party to the unlawful agreement at the time of their commission.

Since the jury was not instructed to make any such findings, it necessarily follows that Moncharsh's guilt of the substantive counts cannot be rested on his conviction for conspiracy.

Another basic distinction between the *Pinkerton* case and this one lies in the fact that the Pinkerton indictment was laid under that portion of the conspiracy statute which in pertinent part provides as follows: "If two or more persons conspire . . . to commit any offense against the United States . . .", whereas the indictment in the instant cause was laid under that section of the statute which in pertinent part provides: "If two or more persons conspire . . . to defraud the United States in any manner or for any purpose . . .".

Thus, in the *Pinkerton* case the conspiracy was one "to commit the acts made offenses against the United States by Sections 2810, 2833, 2834, 3321, 2803 and 3253 of the Internal Revenue Code of the United States . . ." (Transcript of record, No. 719, October Term 1945, p. 8). The substantive counts of the indictment described the separate commission by the defendants of the specific offenses charged in the conspiracy count, e.g., possession of unstamped whiskey, possession of whiskey with intent to defraud United States of the tax thereon, concealing whiskey with intent to defraud the government. And over act 2 (R. 10) was the same as the offense charged in count I of the indictment (R. 2); and overt act 6 (R. 11) was the same as the offense charged in count IV of the indictment (R. 4).

Here, however, the conspiracy was not one to commit the offenses described in the substantive counts, namely,

the filing of false vouchers with an agency of the government. Rather the conspiracy count describes an illicit agreement, the gist of which was the circumvention and defrauding of the inspection system relating to the purchase of eggs, butter and cheese by the War and Navy Departments and the War Shipping Administration from Nye & Nissen. Furthermore, the proof underlying the substantive counts was not directly or indirectly related to the bulk of the proof proffered in support of the conspiracy count. Consequently, while it is conceivable that in the *Pinkerton* case this Court could properly observe that "the unlawful agreement contemplated precisely what was done. It was formed for the purpose . . ." (328 U. S. 640, 647), the same observation is not apposite to the instant case. There was a causal relation between the unlawful agreement to commit the offenses and the actual commission of the offenses in the *Pinkerton* case, but there is no such relationship here. For, if the conspiracy contemplated precisely the filing of false vouchers with the War Shipping Administration in April and May, 1944, and was formed for that purpose, it would have been proper for the prosecution to have charged that the conspiracy was one to commit those offenses.

That the indictment did not so charge is not accidental. And the distinction between a conspiracy to commit offenses against the United States and one to defraud the United States is not one without a difference. The prosecution deliberately refrained from charging a conspiracy to violate Section 35 of the Criminal Code (18 U. S. C. 80) for the reason that the proof of such a charge could only reach Berman and Goddard. Moncharsh could not be charged as a party to such a conspiracy because the only evidence in this case relating to the filing of false vouchers wholly fails to implicate him. The only testimony imputing fraudulent conduct to Moncharsh came from the lips of the witnesses Pineda and Andrade, and was definitely limited as to time and character. Their evidence related

wholly to alleged misconduct on his part with reference to the inspection of eggs by Army and Navy representatives during the years 1938 to 1942 inclusive. The prosecution was unable to establish the filing of any false vouchers whatever through the testimony of the only witnesses in the case who attributed fraudulent conduct to Moncharsh. In substance then, the prosecution employed the charge of a conspiracy "to defraud the United States" in order to reach Moncharsh through the testimony of these witnesses who could not have taken the stand at all had the conspiracy been one "to commit offenses against the United States." Advantage to the government is obvious in that the character of the conspiracy count permitted the conviction of Moncharsh for the separate and distinct offense of conspiracy. And a further advantage was realized in that the proof of the conspiracy in no way was dependent upon any proof of the commission of the substantive offenses.

However, it does not follow that the prosecution may in these circumstances have the additional benefit of the *Pinkerton* rule that conviction on the conspiracy count carried with it conviction on the substantive counts even in the absence of proof of actual commission of the substantive offenses. In the *Pinkerton* case, Daniel was in prison when the substantive offenses were committed, yet he was held guilty of committing them because their commission was the avowed object of the conspiracy. Here, however, the object of the conspiracy was to defraud, not to commit offenses, and therefore conviction on the conspiracy count does not carry with it conviction on the substantive counts in the absence of proof of actual participation in the substantive offenses. There is no such proof here, and that is why we urge that the *Pinkerton* rule cannot apply. To apply it here, in a situation where the commission of the substantive offenses was not the avowed and alleged object of the conspiracy, would be to make a defendant liable for the acts of his co-conspirators beyond the scope of the conspiracy. It would extend the principles

of conspiracy into the realm of constructive guilt and guilt by association. Nothing in the rationale of the *Pinkerton* rule, properly analyzed, supports the perversion of that rule which the Court of Appeals applied to the petitioner Moncharsh here.

B. *There is no substantial evidence that Moncharsh aided or abetted the commission of the substantive crimes.*

It has been pointed out above that the conviction of Moncharsh for the substantive offenses cannot be sustained on the conspiratorial theory because the case was not submitted to the jury on that theory which required a specific and definite instruction. Since it is conceded that there was no evidence whatever upon which the jury could have convicted Moncharsh as a participant in the crimes, the only possible theory upon which his conviction could have been rested was that of aiding or abetting the substantive crimes which theory was advanced to the jury in a definite instruction by the trial judge. But in order to convict him as an aider or abettor, there must be some substantial evidence external to the conspiracy from which the jury could have drawn the inference that he aided, abetted, counseled, commanded, induced or procured the violations of Section 35 of the Criminal Code in April and May, 1944, as described in the substantive counts. When the record is examined, however, it is apparent that there is no evidence whatever that Moncharsh aided or abetted these offenses.

While by statute (Sec. 332 Criminal Code, 18 U. S. C. [1946 ed.] 550) the distinction between accessories before the fact and principals has been abrogated, "it is still necessary to apply the common law rules in order to determine whether a person who is absent when a crime is committed by another, is guilty as a principle under the statute; . . ." *Morei* v. *United States*, 127 F. (2d) 827 (C. C. A. 6).

The common law principles underlying the present federal statute have been set forth with clarity by Judge Learned Hand in *United States* v. *Peoni*, 100 F. (2d) 401

(C. C. A. 2). There Peoni sold counterfeit bills to Regno in the Bronx. Regno sold the same bills to Dorsey who was arrested while trying to pass them in Brooklyn. In passing upon the issue as to whether Peoni was guilty as an accessory to Dorsey's possesion, Judge Learned Hand concisely traced the historical background of the federal aiding and abetting statute. In holding that Peoni was not an aider and abettor of Dorsey's act of possession, the Court, through Judge Hand stated:

> "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would fall upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it."

The view expressed in the *Peoni* case was reiterated by the Court of Appeals for the Second Circuit through the same judge in *United States* v. *Falcone*, 109 F. (2d) 579 (C. C. A. 2), affirmed, 311 U. S. 205, wherein it was held that Falcone who sold sugar in large quantities to grocers, who in turn sold to distillers of illegal alcohol was not guilty of conspiring to operate illicit stills or an abettor of the crime. There it was observed:

> "Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. If they do, he must excuse his conduct by showing that the interest which he was promoting outweighed the dangers which its protection imposed upon others; but in civil cases there has been a loss, and the only question is whether the law shall transfer it from the sufferer to another. There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden under-

taking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. . . ."

Here there was no evidence whatsoever bringing Moncharsh within the compass of the substantive crimes. Actually any reference to him imputing improper conduct on his own part was confined wholly to the period covered by the witnesses Pineda and Andrade, 1938 to 1942. The substantive offenses were all committed in April and May 1944.

The circumstantial evidence implicating Moncharsh in fraudulent misconduct related exclusively to unidentified transactions which occurred at unfixed times in the broad period between 1938 and 1942 regarding purported efforts to circumvent the proper inspection of eggs acquired by the Army and Navy. But the substantive offenses which required a specific intent each related to the filing of a false voucher as a result of a delivery of inferior products (eggs and cheese) with the War Shipping Administration some two years later. It is impossible to establish any causal connection between the activities of Moncharsh with reference to official inspection of eggs for the Army and Navy and the filing of false vouchers with the War Shipping Administration some two years later. The only possible connection between one and the other lies in the theory of a continuing conspiracy and not in the common law concept of aiding and abetting.

Substantially the gist of the government's argument as disclosed in the brief in opposition (Br. Opp. 11-13) is that because there is some circumstantial evidence from which an inference of fraudulent conduct on the part of Moncharsh can be drawn with relation to the inspection of eggs by Army and Navy inspectors some two years prior to the filing of false vouchers with the War Shipping Ad-

ministration then that evidence is sufficient to sustain the common law concept of aiding and abetting the substantive crimes. This contention is invalid for the reason stated above. It ignores the fact that there is no evidence whatever showing a purposive attitude on the part of Moncharsh toward the filing of the false vouchers or that he furthered or assisted the transactions or that he knew the crimes were in the process of commission or that he acted in any manner with an attempt to aid or assist.[8] Thus, while the evidence from which an inference of misconduct on the part of Moncharsh could be drawn for the years 1938 to 1942 is significant for purposes of proving the charged conspiracy and his connection with it, it is apparent that that same evidence cannot be employed for the purpose of proving the aiding and abetting of distinct and separate crimes committed by others some two years later.

It is difficult to discern any distinction between the argument here advanced by the government in support of the theory of aiding and abetting and that which would be advanced in support of the conviction of Moncharsh on the *Pinkerton* rule. If Moncharsh is an aider and abettor of the substantive crimes, we submit that there must be some substantial evidence of his activity in such a capacity as distinguished from his activity merely as a co-conspirator. To support the view of the government would seemingly lead to the abolition of the distinction between the two separate theories of law and to merge one with the other. In essence, to adopt the government's argument would be to hold that evidence of participation in a conspiracy is

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[8] It is significant to note that in the trial court the jury was told by counsel for the government with reference to the substantive crimes that: "Moncharsh is criminally responsible because he aids and abets everything that went on in that plant." (R. 4577) Apart from the unique and untenable legal concept of what constitutes aiding and abetting a crime which this statement illustrates so vividly, it finds no support in the record.

per se evidence of aiding and abetting any and all separate criminal offenses committed by a member of the conspiracy without more.

In view of the foregoing errors, which clearly deprived the petitioner Moncharsh of a fair trial as to his individual guilt or innocence, it seems clear that the case against the corporate petitioner was so interwoven with error that, in the interests of justice, it too should be afforded a new trial.

CONCLUSION.

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted.

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